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IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 692

H. S. RICHARDSON,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term 1941.

No. .

H. S. Richardson,
Petitioner,
against
Commissioner of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on July 25, 1941.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 38) is reported in 42 B. T. A. 830. The opinion of the Circuit Court of Appeals (R. 143) is reported in 121 F. (2d) 1.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered July 25, 1941 (R. 151). The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 935.

Questions Presented.

There are two questions presented in this case, one involving the taxation of the income of certain trusts (hereinafter called the "Trust Issue"), and the other involving the year in which gains and losses on certain security transactions were realized (hereinafter called the "Short Sale Issue"). These two questions arose out of completely separate transactions and have no connection with each other. They were treated separately by the Board of Tax Appeals and the Circuit Court and will be treated separately in this petition.

Trust Issue.

Issue.

The question presented in the Trust Issue is whether, by reason of powers possessed by petitioner with respect to five trusts created by petitioner's wife in 1932, the income of the trusts was taxable to petitioner for the year 1933 under § 22(a) of the Revenue Act of 1932, 47 Stat. 169, 178.

Statutes Involved.

Revenue Act of 1932, § 22(a), 47 Stat. 169, 178:

> "Sec. 22. Gross Income.
>
> (a) GENERAL DEFINITION.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * "

Statement.

The facts in so far as they are relevant to the issues here involved are:

On or about May 15, 1932, petitioner's wife executed five trusts, one for the benefit of each of their five minor children, transferring to the trusts on or about May 16, 1932, an aggregate of 42,500 shares of Piedmont Financial Company of Delaware. The five trusts were identical in form except for the name of the beneficiary and the number of shares transferred. Petitioner was trustee of all the trusts (R. 43).

Under each trust indenture the trustee is directed to hold, invest and reinvest the principal, collect the income therefrom, and in his discretion to apply so much of the income as he deems advisable to the "Beneficiary's maintenance, education or benefit", until the latter becomes 21 years of age, and thereafter to pay so much of the income as he deems advisable to the beneficiary until the latter becomes 35; to accumulate and invest the undistributed trust income and pay over such accumulations to the beneficiary upon his reaching 35 years of age; and thereafter to pay the income of the trust to the beneficiary for life (R. 44).

Each trust is to terminate upon the death of the beneficiary and the principal and any unpaid accumulation is to be paid over to the beneficiary's descendants, or, in certain events, to his brothers and sisters in a certain manner (R. 44).

The trustee is given "full power and authority, in his absolute and uncontrolled discretion", to sell or exchange the trust property at any time for such price as he deems advisable and to reinvest the proceeds in any character of property, real or personal, although it may not be of the character permitted by law for the investment of trust funds; to expend trust income and proceeds in "payment of premiums for life insurance" upon the lives of the grantor or petitioner; to purchase real or personal property from the grantor or petitioner and to make secured

or unsecured loans to them without liability "in any way for any loss resulting to the trust estate by reason of such purchase or loan", and, further, to cause the trust securities to be registered in his name as trustee, or in his own name, or in the name of his nominee, and, also, to join in or become a party to any reorganization, merger, or exchange affecting any trusteed securities (R. 44, 45). Each trust agreement further provides:

> "Eleventh: During his lifetime, H. Smith Richardson, husband of the Grantor, may cancel and terminate this agreement by an instrument in writing duly executed and acknowledged and filed with the Trustee or Trustees then acting, and upon such termination and cancellation the said H. Smith Richardson shall be entitled to receive the corpus of the trust fund absolutely and free from all trusts" (R. 45).

The five trusts created by petitioner's wife are still in existence. Petitioner has not exercised his power to terminate such trusts and he has not commingled any of the trust funds with his own properties. Petitioner has not used any of the income of the trusts for his own benefit, but as trustee has accumulated and invested such income except for small distributions to his two daughters (R. 46). All income received by these trusts since their inception has been accounted for for Federal income tax purposes by the trustee or by the beneficiaries (R. 46).

The Commissioner determined that the income from the five trusts was taxable to petitioner. The Board of Tax Appeals held that the trust income was taxable to petitioner under § 22(a) of the Revenue Act of 1932 because of the power granted to him in the trust instruments (R. 51, 52) and the Circuit Court of Appeals affirmed the Board of Tax Appeals (R. 143).

The Circuit Court of Appeals based its decision on the decision of this Court in *Helvering* v. *Clifford,* 309 U. S. 331 (1940). It is the contention of the petitioner that

the *Clifford* case has no application to the present case, because the petitioner was not the grantor of the trusts here involved. For, it is clear that under the findings (R. 41, 42) and opinion (R. 50, 51) of the Board of Tax Appeals, this case must be treated as if petitioner were a complete stranger to the trusts.

As we shall hereafter point out, the distinction, for tax purposes, between powers reserved by an owner of property in a grant thereof, and powers donated by the owner to a third person, is fundamental. The Circuit Court of Appeals disregarded this distinction in applying to the case of a mere donee of powers language which this Court in the *Clifford* case used with respect to powers reserved by a grantor. The *Clifford* case deals with the issue of whether or not an owner of the property has divested himself of such ownership sufficiently to deflect from himself the income from the property. It represents an application of a principle laid down by this Court long before the *Clifford* case, in *Lucas* v. *Earl*, 281 U. S. 111 (1930), and more recently in *Helvering* v. *Horst*, 311 U. S. 112 (1940), to the effect that a man may not escape tax on income until he has actually divested himself of the source of the income. In the *Clifford* case the question was one of *continuing* the status of an *existing* taxpayer with respect to certain property, as is emphasized by the language of this Court throughout its opinion. Here the question is one of *creating* a *new* taxpayer with respect to such property solely by reason of donated powers possessed but never exercised by him.

That question, as we show hereafter, is governed by entirely different lines of authority than that of the taxation of trust income to a grantor.

Specification of Error to be Urged.

The Circuit Court of Appeals erred in holding that, by reason of powers possessed by the petitioner with respect to the five trusts created by petitioner's wife on May 15, 1932, he was taxable upon the income of the trusts under § 22(a) of the Revenue Act of 1932.

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals involves "an important question of Federal law which has not been, but should be, settled by this Court"[1], a question, the decision of which also is important to the revenue. That question is whether or not the principle of *Helvering* v. *Clifford, supra,* extends to cases where the taxpayer is not the grantor of the trust, and the power in question is not a reserved, but a donated, power. For, it is clear that under the findings (R. 41, 42) and opinion (R. 50, 51) of the Board of Tax Appeals, this case must be treated as if petitioner were a complete stranger to the trusts.

The importance of the *Clifford* case needs no emphasis. It is universally recognized as a landmark in the law of the income tax affecting trusts. A great many cases involving its application have arisen and are constantly arising in the Circuit Courts of Appeals and in the Board of Tax Appeals.[2] In all these cases (with the exception

[1] Supreme Court Rule XXXVIII 5(b).

[2] *Commissioner* v. *Prouty*, 115 F. (2d) 331 (C. C. A. 1, 1940); *Fulham* v. *Commissioner*, 110 F. (2d) 916 (C. C. A. 1, 1940); *Commissioner* v. *Branch*, 114 F. (2d) 985 (C. C. A. 1, 1940); *White* v. *Higgins*, 116 F. (2d) 312 (C. C. A. 1, 1940); *Commissioner* v. *O'Keefe*, 118 F. (2d) 639 (C. C. A. 1, 1941); *Helvering* v. *Achelis*, 112 F. (2d) 929 (C. C. A. 2, 1940); *Helvering* v. *Abraham*, 115 F. (2d) 368 (C. C. A. 2, 1940); *Helvering* v. *Palmer*, 115 F. (2d) 368 (C. C. A. 2, 1940); *Commissioner* v. *Berolzheimer*, 116 F. (2d) 628 (C. C. A. 2, 1940); *Commissioner* v. *Buck*, 120 F. (2d) 775 (C. C. A. 2, 1941); *Commissioner* v. *Chamberlain*, 121 F. (2d) 765 (C. C. A. 2, 1941); *Commissioner* v. *Barbour*, 122 F. (2d) 165 (C. C. A. 2, 1941); *Commissioner* v. *Jonas*, 122 F. (2d) 169 (C. C. A. 2, 1941); *Commissioner* v. *Wooley*, 122 F. (2d) 167 (C. C. A. 2, 1941); *Helvering* v. *Elias*, 122 F. (2d) 171 (C. C. A. 2, 1941); *Kraft* v. *Commissioner*, 111 F. (2d) 370 (C. C. A. 3, 1940); *Commissioner* v. *Richter*, 114 F. (2d) 452 (C. C. A. 3, 1940), reversed and remanded 312 U. S. 561 (1941); *Whiteley* v. *Commissioner*, 120 F. (2d) 782 (C. C. A. 3, 1941); *Commissioner* v. *Brown*, —— F. (2d) —— (C. C. A. 3, Sept., 1941); *Commissioner* v. *Ward*, 119 F. (2d) 207 (C. C. A. 3, 1941);

(Continued on next page)

of *Helvering* v. *Safe Deposit & Trust Company of Baltimore*, 121 F. (2d) 307 (C. C. A. 4, 1941), which involved the estate tax, and which is relied on in support of our second reason for the granting of the writ), the powers in question were reserved by grantors, and even so, the decisions of the Courts and the Board are not always easy to reconcile. It has been said that "few deci-

Helvering v. *Dunning*, 118 F. (2d) 341 (C. C. A. 4, 1941); *Helvering* v. *Safe Deposit & Trust Co. of Baltimore*, 121 F. (2d) 307 (C. C. A. 4, 1941); *Reuter* v. *Commissioner*, 118 F. (2d) 698 (C. C. A. 5, 1941); *Altmaier* v. *Commissioner*, 116 F. (2d) 162 (C. C. A. 6, 1940), cert. denied 312 U. S. 706 (1941); *Commissioner* v. *Central National Bank of Cleveland*, 119 F. (2d) 470 (C. C. A. 6, 1941); *First National Bank of Chicago* v. *Commissioner*, 110 F. (2d) 448 (C. C. A. 7, 1940); *Penn* v. *Commissioner*, 109 F. (2d) 954 (C. C. A. 8, 1940); *Helvering* v. *Hormel*, 111 F. (2d) 1 (C. C. A. 8, 1940), affd. and remanded 312 U. S. 552 (1941); *Thomson* v. *Helvering*, 114 F. (2d) 607 (C. C. A. 8, 1940); *Rand* v. *Helvering*, 116 F. (2d) 929 (C. C. A. 8, 1941), cert. denied 61 Sup. Ct. 1120 (1941); *Cox* v. *Commissioner*, 110 F. (2d) 934 (C. C. A. 10, 1940); *Jones* v. *Norris*, 122 F. (2d) 6 (C. C. A. 10, 1941); *Reuter* v. *United States*, 34 Fed. Supp. 1014 (Ct. Cl. 1940), cert. denied 312 U. S. 695 (1941); *Lester* v. *United States*, 35 Fed. Supp. 535 (Ct. Cl. 1940); *Morton Stein*, 41 B. T. A. 994 (1940); *William J. Garland*, 42 B. T. A. 324 (1940); *Margaret R. Phipps*, 42 B. T. A. 329 (1940); *Lolita S. Armour*, 41 B. T. A. 777 (1940); *Dunlevy Milbank*, 41 B. T. A. 1014 (1940); *Edward H. Heller*, 41 B. T. A. 1020 (1940); *George H. Deuble*, 42 B. T. A. 277 (1940); *Herbert W. Hoover*, 42 B. T. A. 289 (1940); *Frank G. Hoover*, 42 B. T. A. 786 (1940); *Frank E. Wolcott*, 42 B. T. A. 1151 (1940); *Archibald G. Bush*, 43 B. T. A. 535 (1941); *Elizabeth K. Lamont*, 43 B. T. A. 61 (1940); *John P. Wilson*, 42 B. T. A. 1260 (1940); *R. Douglas Stuart*, 42 B. T. A. 1421 (1940); *Purdon Smith Whiteley*, 42 B. T. A. 316 (1940); *Lady Marian Bateman*, 43 B. T. A. 69 (1940); *Snowden A. Fahnestock*, 43 B. T. A. 569 (1941); *William J. McCormack*, 43 B. T. A. 924 (1941); *Charles B. Bohn*, 43 B. T. A. 953 (1941); *Jessie W. Donahue*, 44 B. T. A. 329 (1941); *Frances S. Willson*, 44 B. T. A. 583 (1941); *Walter F. Hallowell*, 44 B. T. A. 740 (1941); *David M. Heyman*, 44 B. T. A. 1009 (1941); *Reginald B. Parsons*, 44 B. T. A. 1142 (1941); *Mary W. Pingree*, 45 B. T. A.—No. 6 (1941); *Frederick Ayer*, 45 B. T. A.—No. 26 (1941). In addition, the Board of Tax Appeals is constantly deciding cases involving this issue which are not officially reported.

sions have provoked such extensive controversy as has *Helvering* v. *Clifford*" and that the application of that case "has left confusion in its wake".[3] Some of the difficulty is perhaps unavoidable in view of the fact that the determination of the issue depends upon a consideration of all the facts involved. See 309 U. S. 331, 335, 336.

But where the powers which raise the issue are possessed by a person other than the grantor, the Courts and the Board are met at the threshold of their inquiry by a question not of fact but of law, namely, whether powers which, if reserved by a grantor, would be sufficient to make the income taxable to him, are sufficient to make the income taxable to a third person, who possesses but has not exercised them, on the theory that his ability to take the income makes it his for tax purposes. This is an important question which, in the interest of clarification of the law, avoidance of litigation, and certainty of administration of the revenue, should be answered definitely and promptly.

Suppose that a grantor, A, creates a short term trust for members of his family identical in its provisions and the powers retained by the grantor with the trust considered in *Helvering* v. *Clifford*, but gives to B, a stranger to the trust, a power of termination identical with that contained in Article Eleventh of the trust deeds here in question. Who is taxable upon the income—A or B? Or suppose, eliminating the trust feature, a grantor, A, places a million dollars of bonds in escrow by the terms of which B may at any time within a period of five years call upon the escrow for complete transfer to himself of the bonds or any part thereof; in the meanwhile the bonds to be treated in all respects as A's, the income to be paid to him, and his directions, not inconsistent with B's right of call, to be followed by the escrow. So long as B fails to exercise his right of call for the bonds, who is taxable upon the income—A or B?

[3] Paul, Studies in Federal Taxation, Third Series, pp. 207, 204, footnote 149.

The donee of an unexercised power is in no realistic sense in a position tantamount to ownership of the property. He has had no previous relation to it. He does not presently enjoy it. He is in the position of a man who has been offered property but has not accepted it.

Under a system of graduated rates of taxation, based on ability to pay, a Congressional intention to impute the tax obligations of complete ownership of property to one whose relation to it realistically considered is in fact not practically tantamount to ownership, should not be implied unless the language of the statute or other evidence of legislative intention manifestly require it. But the general definition of gross income embodied in § 22(a) by no means clearly covers the situation here presented; and the legislative history of successive Federal Revenue acts discloses cogent evidence of Congressional recognition of a fundamental difference between the relative positions, for tax purposes, of a grantor reserving powers and a donee possessing such powers, so long as they remain unexercised.

The first estate tax law (Revenue Act of 1916) contained no provision specifically dealing with property covered by a general power of appointment. Subdivisions (a) and (b) of § 202, however, contained general provisions, quite comparable in the estate tax law to the general language of § 22(a) relied upon by the Circuit Court in the income tax law, covering any "interest" in property of the decedent at death, which was subject to the payment of charges against his estate and to distribution as a part thereof,[4] and any interest of which the decedent

[4] In *Helvering* v. *Safe Deposit & Trust Co. of Baltimore*, 121 F. (2d) 307, above referred to *passim*, the Circuit Court of Appeals for the 4th Circuit held (p. 310) that the authority of the *Field* case was not in any way weakened by the fact that the language "which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate" was omitted from the corresponding provision of the Revenue Act of 1926.

had made a transfer in contemplation of, or to take effect in possession and enjoyment at or after, his death. Under this general language the Treasury Department promulgated a regulation directing the inclusion of property passing under a general power of appointment in the gross estate of the holder of the power. This Court held that regulation invalid in *United States* v. *Field,* 255 U. S. 257 (1921), saying (pp. 263, 264):

> "But the existence of the power does not of itself vest any estate in the donee. * * *
>
> "It follows that the *interest in question not having been property of Mrs. Field* at the time of her death, nor subject to distribution as part of her estate was not taxable." (Italics ours.)

In later Revenue Acts the estate tax law has been successively amended so that there are now two subdivisions in Section 302 dealing expressly with the effect of powers—subdivision (d) requiring the inclusion in the gross estate of any interest in property of which the decedent had made a transfer, where the enjoyment of the property was subject, at the date of decedent's death "to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death * * *"; and subdivision (f) requiring inclusion of property *passing* under a general power of appointment *exercised* by the decedent either by will, or by inter vivos deeds of specified kinds.

It is of the utmost significance as evidence of Congressional intent that the powers covered by subdivision (d), which may result in taxation whether or not they are exercised, are limited to powers possessed by the *grantor* and that the provisions of subdivision (f) which cover both reserved and donated powers require inclusion of property only when those powers are actually exer-

cised by the decedent and the property passes under such exercise. The result of the above amendments to the Act, together with this Court's decision in *United States* v. *Field, supra,* is that a power of revocation reserved by a grantor of property, although unexercised, makes the property subject to it includable in the grantor's estate; but a similar power reposed in a donee does not require the property subject to it to be included in the donee's estate unless the power is exercised and the property passes by virtue thereof. This conclusion has been affirmed by the recent decision of the Circuit Court of Appeals for the Fourth Circuit in *Helvering* v. *Safe Deposit & Trust Company of Baltimore,* 121 F. (2d) 307 (C. C. A. 4, 1941), in which the Court traced, page 312, the legislative history above set forth and refused to sustain the Commissioner's attempt to tax under § 302(a) as an "interest" in property, a power reposed in a donee and not exercised.

With respect to the income tax: Congress in 1924 amended the law so as expressly to tax trust income to grantors who possessed certain powers over the corpus or income of trusts. (See §§ 166 and 167 of the Internal Revenue Code.) It has refrained in any of the subsequent re-enactments of the income tax law from inserting any provision so taxing a donee of similar powers prior to his exercise thereof and his enjoyment of the income pursuant to such exercise. Until the decision of the instant case it had never been held by any Court that a donee of such powers was liable for income tax by reason of such unexercised powers.

The decision of this question is particularly important to the administration of the income tax because of the number of trusts that are affected. Many trusts, both *inter vivos* and testamentary, contain provisions permitting the life beneficiary to require the payment to him of all or a portion of the trust corpus under various conditions. Sometimes this right is given to the possessor thereof unconditionally, sometimes only with the consent of the trustee, and sometimes upon a showing of need for support and maintenance. The taxability of the income from

all trusts subject to such a power is affected by the decision of the Circuit Court.

The determination is also important in the administration of the related gift tax and estate tax, since the decision of the Circuit Court raises difficulties in connection with those taxes. Suppose a grantor A executes a trust deed making B trustee, but giving C, a trusted friend, a power of termination similar to that contained in Article Eleventh of the present trust deeds. Who would be required to file a donee's return under the gift tax, and have the secondary obligation to pay the tax if the donor does not—B or C? Must C, so long as he refrains from exercising the power, pay a gift tax (as well as an income tax, if the instant decision remains the law) on each installment of income which passes to the life beneficiary? If the trust continues for the full term specified in the trust instrument, without C having exercised his power, is he liable for a gift tax upon the devolution of the corpus to the remainderman? And if C dies during the trust term, without having exercised the power, is the corpus of the trust to be included in his gross estate for estate tax purposes? If, on the other hand, C relinquishes the power, does he thereby become liable for a gift tax upon the corpus? The fact that the Courts are already having to face these implications of the *Clifford* case in dealing with gift tax and estate tax problems is evidenced by *Helvering* v. *Safe Deposit & Trust Company of Baltimore*, 121 F. (2d) 307, *supra*, and *Commissioner* v. *Prouty*, 115 F. (2d) 331 (C. C. A. 1, 1940).

2. The decision of the Circuit Court of Appeals in this case conflicts in principle[5] with the recent decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Helvering* v. *Safe Deposit & Trust Company of Baltimore*, 121 F. (2d) 307 (C. C. A. 4, 1941). The Government applied for certiorari in that case on September 10, 1941.

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[5] Supreme Court Rule XXXVIII 5(b).

In the *Safe Deposit & Trust Company of Baltimore* case, the decedent was the beneficiary of three trusts created under wills and deeds of his parents. He was the income beneficiary of these trusts, and in the case of one of them was to receive the entire trust property upon reaching the age of 28. Under the other two trusts he was to receive the income during his life. Under all of them he was given a general testamentary power of appointment, and in all of them there was a gift over, in default of the exercise of the powers, to decedent's descendants, or in the absence thereof, to his brothers and sisters. Decedent died before reaching the age of 21 and without having made a valid exercise of the powers of appointment. The Commissioner contended that the *corpora* of these trusts were includable in his gross estate for estate tax purposes, not under § 302(f) of the Revenue Act of 1926 dealing specifically with the inclusion of property passing under general powers of appointment, but under § 302(a) of the Revenue Act of 1926, which may be said to be the provision in the estate tax law corresponding to § 22(a) of the income tax law, and which provided that there should be included in the value of the gross estate all property "to the extent of the interest therein of the decedent at the time of his death".

In pressing this contention, the Commissioner advanced (121 F. (2d) p. 313) the "bundle of rights" doctrine of the *Clifford* case, and contended that the decedent's interest in the income of the property, together with the expectation of receiving the corpus of one of the trusts upon attaining 28, in addition to the possession of general powers of appointment over all the trusts, was sufficient to give him an "interest" in the property within the meaning of § 302(a). The Court, however, rejected this argument, saying, 121 F. (2d) 313:

> "The answer to this is that in the 'whole bundle of rights' there was not a single one which constituted an interest in the property at the time of decedent's death; and it is only where such inter-

> ests can be found that the property can be included in the gross estate for the purpose of the tax."

In other words, the Court felt that before the doctrine of the *Clifford* case could be applied, the relationship of the taxpayer to the property in question must have been something more than that of the mere possessor of a donated unexercised power. The decision of the Circuit Court here is to the contrary, and it is submitted that there is a clear conflict not only in the underlying principles of these decisions, but in the specific point as to the applicability of the *Clifford* case to powers possessed by someone other than the grantor.

The *ratio decidendi* of the Circuit Court in this case is also in conflict with that of the Circuit Court of Appeals for the Sixth Circuit in *Brown* v. *Routzahn,* 63 F. (2d) 914 (C. C. A. 6, 1933), and *Commissioner* v. *Mott,* 85 F. (2d) 315 (C. C. A. 6, 1936).

In the *Brown* case, the decedent was given under the will of his wife a one-third interest in all her property, together with certain interests in the balance of the property. The decedent took no definite position with respect to his rights under the will until the distribution of the estate eight years after his wife's death. He then refused to accept the gift of one-third of his wife's property, although accepting the other rights and benefits given to him under the will. The Government contended that the decedent owned the one-third of his wife's estate from her death until the distribution and that his renunciation of it upon such distribution amounted to a transfer by him of the one-third interest, which transfer was in contemplation of death. The Court, however, decided against the Government and held that the grantor never owned the property in question. The Court said, page 917:

> "The decedent never owned or had control of the property as donee. All that he had was a right to accept."

In the *Mott* case the taxpayer was trustee of three trusts under which he was entitled to receive 3% of the income as compensation for services. The petitioner, however, did not accept any compensation for his services as trustee, or receive any of the commissions to which he was entitled. The Commissioner held that he was nevertheless taxable thereon, since he could have received the commissions had he so elected. The Court, however, held that the amount of the commissions was not taxable income to the petitioner. The Court said, page 317:

> "To hold that he is chargeable with receiving compensation which he might have received but did not receive would be contrary, in our opinion, to the aims and purposes of the income tax laws."

The attempt of the Circuit Court in the instant case to press the general definition of gross income embodied in § 22(a) to support a theory that anyone who has the right to obtain income, or the property from which it flows, is taxable upon it, regardless of whether or not he exercises that right, would introduce the utmost confusion in the administration of the Revenue Act in its application to situations such as those involved in the two decisions of the Circuit Court of Appeals for the Sixth Circuit above cited and innumerable other situations which imagination will readily suggest. We submit that it is important that the question of how far the theory of the Circuit Court in the instant case is to extend the presently accepted limits of the doctrine of constructive receipt should be clarified by decision of this Court.

3. The decision of the Circuit Court of Appeals is also a decision of a Federal question "in a way probably in conflict with applicable decisions of this Court".[6] *Field* v. *United States,* 255 U. S. 257, *supra,* p. 11. The *Field* decision has been consistently followed and was recently

[6] Supreme Court Rule XXXVIII 5(b).

expressly reaffirmed in the face of an attack on it by the Commissioner in *Helvering* v. *Safe Deposit & Trust Company of Baltimore, supra.* See also *Davis, Administrator* v. *United States,* 27 Fed. Supp. 698, 700 (D. C. S. D. N. Y. 1939).

Short Sale Issue.

Issue.

The question presented in the Short Sale Issue is whether or not the petitioner's gain or loss on certain short sales of the capital stock of Drug, Inc., made by him during 1932 and 1933, was realized in the year in which covering purchases were made, or in the year in which the stock which he borrowed to make the short sales was returned to the lenders.

A subsidiary issue raised before the Board and the Circuit Court of Appeals, as to whether the sale of 7,100 shares of Drug, Inc., through the same account were short sales or long sales, is not pressed by the petitioner.

Statutes Involved.

Revenue Act of 1932, 47 Stat. 169.

Section 22(a), set forth on page 2, *supra.*

"Sec. 111. Determination of Amount of Gain or Loss.

(a) Computation of Gain or Loss.—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b), and the loss shall be the excess of such basis over the amount realized."

Statement.

The facts in so far as they are relevant to this petition are as follows:

The petitioner, his brother and their families controlled the Piedmont Financial Company of New York (hereinafter sometimes called the Management Company, and not to be confused with Piedmont Financial Company of Delaware mentioned under the Trust Issue) which maintained various custodian accounts with the Bankers Trust Company, New York City, as agent for the petitioner and his brother and for the members of their families and for their various enterprises. Bankers Trust Company acted upon the instructions of the Management Company as to receipt or withdrawal of securities and funds for those various accounts (R. 40, 52).

In February, 1932, the petitioner decided to make short sales of Drug, Inc., stock and instructed the Management Company as his agent to make such sales on his behalf. The Management Company thereupon opened a new custodian account for petitioner with Bankers Trust Company known as "Account No. 18 H. S. Richardson, Drug, Incorporated, Short Account" (referred to by the Board of Tax Appeals and hereafter in this petition as "Short Account No. 18") for convenience in carrying out petitioner's instructions (R. 53). This account continued from February 25, 1932, until July 17, 1933, when the borrowed shares were returned to the lenders. In it the Management Company recorded at the time of each transaction the sales and purchases of Drug, Inc., stock made during that period at the direction of the Management Company on behalf of petitioner (R. 53).

In order to make deliveries of the short sales made through this account, the petitioner borrowed 25,700 shares of Drug, Inc., from Piedmont Financial Company of Delaware, and 2,000 shares from Piedmont Development Corporation. These borrowed shares were placed in Short Account No. 18. As sales were made on the New York Stock Exchange, Short Account No. 18 would make delivery therefor by delivering the stock which was borrowed as aforesaid. All sales and purchases in the account were treated as short sales and covering pur-

chases, and the account was consistently so regarded by the petitioner and by the Management Company. All the purchases made for Short Account No. 18 were matched against the earliest sales in that account not theretofore matched, for the purpose of reflecting the gain or loss on such sales (R. 53, 54, 122).

In Short Account No. 18 each sale was reflected by entries of the date, the name of the broker making the sale, the number of shares sold, the "short balance" in shares as increased by the sale on that date, the sale "price" per share, the "proceeds of sale", and the net "short balance" in dollars and cents as increased by the proceeds of the sale on that date. Each purchase was reflected in that account by entries of the date, the name of the broker making the purchase, the number of shares bought, the "short balance" in shares as decreased by the purchase on that date, the purchase "price" per share, the total "cost debit", the "profit or loss" represented by the difference between the selling price and the purchase price of the matched sale and purchase, the "cost credit" represented by the cost plus the profit or minus the loss, and the net "short balance" in dollars and cents as decreased by such cost credit on that date (R. 27, 54).

For the year 1932 the petitioner computed his profit in Short Account No. 18 by determining the excess of the proceeds of the sales over the cost of all matched purchases made during 1932, and reported such excess, with adjustments not here pertinent, as a gain on his Federal income tax return for 1932. For the year 1933 the petitioner computed his loss in this account in the same way, that is, by determining the excess of the purchase price of the covering purchases over the proceeds of the short sales. On his Federal income tax return for 1933 petitioner claimed a deduction of such excess with certain adjustments not here pertinent (R. 56).

In his deficiency notice for the year 1933 the respondent stated that the profit in Short Account No. 18, reported in petitioner's 1932 return, had been eliminated

from taxpayer's 1932 income on the ground that the transaction was not completed until the borrowed shares were returned to the lenders in 1933, and that the petitioner realized a profit in 1933 represented by the excess of the proceeds of all sales made through Short Account No. 18 over the cost of all purchases in the account during 1932 and 1933 with certain adjustments not pertinent to this petition (R. 56, 57).

The Board of Tax Appeals sustained this action of the respondent (R. 52-63), six members dissenting. The Circuit Court of Appeals affirmed the Board of Tax Appeals (R. 147).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In holding that gain or loss with respect to the short sales made in Short Account No. 18 was not realized until 1933 when the stock borrowed to make such short sales was returned to the lenders.

2. In failing to hold that gain or loss with respect to the short sales made in Short Account No. 18 was realized in the year that covering purchases were made.

Reasons for Granting the Writ.

This petition for certiorari is limited to the question of when gain or loss was realized with respect to the 27,700 shares of Drug, Inc., stock that were returned to the lenders in 1933. Because of its comparative unimportance it is not intended to press further the question of whether an additional 7,100 shares of stock sold were short sales or long sales. Accordingly, the portion of the decision of the Circuit Court in controversy is the last three paragraphs thereof (R. 148, 149).

The decision of the Circuit Court on this point conflicts in principle with the following decisions of Cir-

cuit Courts of Appeals for other circuits: *Commissioner* v. *Dashiell*, 100 F. (2d) 625 (C. C. A. 7, 1938); *Commissioner* v. *Feree*, 84 F. (2d) 124 (C. C. A. 3, 1936); *Huntington National Bank* v. *Commissioner*, 90 F. (2d) 876 (C. C. A. 6, 1937); *Commissioner* v. *Robinson*, 103 F. (2d) 1009 (C. C. A. 6, 1939); *Commissioner* v. *Mott*, 103 F. (2d) 1009 (C. C. A. 6, 1939), and also with the Circuit Court's own decision in *Ruml* v. *Commissioner*, 83 F. (2d) 257 (C. C. A. 2, 1936). The rule of the above cases has been recognized by the Commissioner in G. C. M. 21503, 1939—2 C. B. 205. See also I. T. 3442, 1941 C. B. 3—10565.

The above were cases where the taxpayer at the end of the year desired to make a sale of stock owned by him and caused the sale to be executed on the New York Stock Exchange, but was unable to make actual delivery of the stock which he intended to sell until the following year. In these cases, as here, all the elements necessary to the determination of the gain or loss were present when the sale was executed, *i.e.*, the cost of the stock desired to be sold by the taxpayer, and the price at which the stock was sold. However, the sales could not be completed because of physical difficulties until the following year. The Courts held in the above cases that gain or loss was realized in the year in which the sales were executed and was not postponed until the later year when physical delivery was made.

The conflict in principle between the decision of the Circuit Court in this case and the above cases is clear. The execution of the covering purchases in Short Account No. 18 made the gain or loss "certain in fact and ascertainable in amount". The entry of the profit or loss in Short Account No. 18 immediately upon the execution of the covering purchase was a complete manifestation of intention to treat the transaction as a short sale which corresponds to the intention to make a long sale manifested in the above cases. The Government agrees that

that was the event which determined the *amount* of the gain or loss realized. The only controversy is as to the *time* of realization. Under the circumstances of this case the return of the stock to the lenders was no more essential to the completion of the transaction than was the delivery by the taxpayer of the certificates to the broker in the *Ruml, Dashiell* and *Mott* cases.

The Circuit Court attempts to distinguish the *Ruml* and *Dashiell* cases by saying that in those cases "the sellers' shares at the time the stock was loaned by the broker belonged in equity to the lender" (R. 149). We question the correctness of this statement. In those cases the broker had no specific right to any particular share owned by the seller and there was no reason why the seller could not, if he had so desired, have continued to hold the shares in question and purchased other shares to deliver to the broker. The sellers did not do so, and respect was given to their manifestation of intention to sell the shares which they owned. Similarly, in the present case respect should be given to the manifestation of intention on the part of the petitioner to match the purchased shares against the short sales.

Moreover, the decision of the Circuit Court is contrary to the interests of the revenue. As pointed out by the dissenting members of the Board (R. 61-63), the Circuit Court reached the anomalous result that after the gain or loss is fixed, the year of realization can be postponed at the pleasure of the taxpayer. In the present case petitioner did not need to return the stock to Piedmont Financial Company of Delaware or Piedmont Development Corporation in 1933, and under the decision of the Circuit Court he could by merely continuing to hold the stock and not returning it have avoided reporting any profit on the transaction to this day.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

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